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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1951

No. 541

RISS AND COMPANY, INC., A CORPORATION,
Appellant,

vs.

THE UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI

STATEMENT AS TO JURISDICTION

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

Civil Action No. 4806

RISS & COMPANY, INC.,

Plaintiff,

vs.

UNITED STATES AND INTERSTATE COMMERCE COMMISSION,

Defendants

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of the Rules of the Supreme Court of the United States, as amended, plaintiff-appellant, Riss & Company, Inc., submits herewith its statement particularly disclosing the basis upon which the Supreme Court has jurisdiction on appeal to review the judgment and decree of the District Court entered in this cause.

Opinion Below

The opinion of the District Court for the Western District of Missouri has not yet been reported. A copy of the memorandum opinion of the District Court containing the findings of fact, conclusions of law and judgment and a copy

of the final decree are attached hereto as Appendix A. This action was consolidated for trial with Civil Action No. 4974 which is not involved in this appeal. Accordingly, portions of the memorandum opinion relating only to Civil Action No. 4974 are omitted from Appendix A.

Jurisdiction

The judgment of the District Court was entered on September 27, 1951. A petition is presented to the District Court herewith, to-wit, on November 26, 1951. The jurisdiction of the Supreme Court to review this decision by direct appeal is conferred by Title 28, United States Code, Sections 1253 and 2101(b). The following decisions sustain the jurisdiction of the Supreme Court to review the judgment on direct appeal in this case: *United States* v. *Pierce Auto Freight Lines*, 327 U. S. 515; *American Trucking Association* v. *United States*, 326 U. S. 77; *United States* v. *Detroit and Cleveland Navigation Company*, 326 U. S. 236.

Questions Presented

1. Whether an order of the Interstate Commerce Commission relating to the unitary activity of a motor carrier is valid and can be sustained where in portions of the order the Commission has made no findings upon which judicial review can be based.

2. Whether an order of an administrative agency or an order of the Interstate Commerce Commission can be sustained where only general, indefinite findings have been made and the specific facts found are at variance with the facts of record or fail to include a portion of the facts derived from the same documents as the facts found.

3. Whether a court reviewing an order of the Interstate Commerce Commission can properly disregard or fail to consider uncontradicted and substantial evidence on the

record considered as a whole which is opposed to determinations of the Interstate Commerce Commission which determinations are based wholly upon indefinite findings disregarding and failing to reflect such evidence.

4. Whether in an order granting or denying rights under Section 206(a) of the Interstate Commerce Act, the Commission, as the District Court in its opinion states, "must take into consideration certificates and rights which have been granted other carriers".[1]

Statutes Involved

This case involves the application of Section 206(a) of the Interstate Commerce Act, 49 U. S. C. § 306(a) and Section 10 of the Administrative Procedure Act, 5 U. S. C. § 1009. These sections are set out in Appendix B hereto.

Statement

Appellant, plaintiff below, hereinafter referred to as Riss, is a common carrier by motor vehicle holding certificates of public convenience and necessity issued by the Interstate Commerce Commission. This action was brought to suspend, set aside and permanently enjoin orders of the Interstate Commerce Commission, hereinafter referred to as Commission, dated February 3, 1945, and October 4, 1948, in so far as the orders deny certificates of public convenience and necessity sought by Riss or its predecessor in interest under Section 206(a) of the Interstate Commerce Act.

Proceedings were initiated on January 23, 1936, by Monark Motor Freight System, Inc., a predecessor of appellant, hereinafter referred to as Monark. Monark filed with the Commission an application under Section 206(a) for

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[1] All the points raised in the Assignment of Errors are also presented. The questions presented stated above set forth the major issues.

a certificate of public convenience and necessity for the transportation by motor vehicle of general commodities over routes, to points and within territories in the states of Missouri, Kansas, Nebraska, Kentucky, Iowa, Illinois, Indiana, Ohio, Pennsylvania, West Virginia, Virginia, Maryland, New Jersey, New York, Delaware, Rhode Island, Connecticut and Massachusetts.

Informal hearings were held and following requests of various rail carriers and railroad associations formal hearings were held in 1939. Additional hearings were held in 1942. Riss purchased all operating rights and property of Monark in 1942 with the requisite approval of the Commission,[2] and succeeded to all of Monark's as yet undetermined rights. Following the submission of briefs and examiner's report and order and exceptions thereto, Division 5 of the Commission on February 3, 1945 issued its report and order granting a portion of the routes and points claimed in the application and denying the remainder. Riss filed a Petition for Reconsideration and the Commission vacated that portion of this order denying operating authority over nine route segments for further consideration of the record.

On May 7, 1946, appellant filed with the Commission a Petition for Reconsideration of the entire order of February 3, 1945. Promptly after the denial of this petition, Riss filed the original complaint in the present suit. The statutory court held the matter in abeyance until such time as the Commission might reconsider the portion of the order relating to the nine route segments. On October 4, 1948 the Commission entered its order on this aspect of the case. Following issuance of a certificate of public convenience and necessity on February 20, 1950, granting Riss operating

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[2] *Riss—Purchase—Monark Freight System, Inc.*, 38 M.C.C. 563.

authority in accordance with these two orders, an amended complaint and answers thereto were filed in the instant suit.

Of the two orders challenged herein, the order of February 3, 1945, despite its length and detail, in certain instances contains no findings as to certain claimed rights and in other instances, the findings as made are inadequate and indefinite. Moreover, the order is not based upon substantial evidence on the whole record. The order discusses each of the claimed regular routes and the showing of service to the intermediate and off-route points located on or near such routes. As to these routes and points, the order contains initial and preliminary findings of facts, in the form of a listing of shipments to and from the various intermediate and off-route points. Inasmuch as the Commission stated that it would give little if any consideration to the oral testimony, but would primarily base its findings upon the documentary evidence, the order premises the grant or denial of service over the routes upon the showing made as to the intermediate and off-route points on such routes.

Following the listing of shipments disclosed by the documentary evidence to have been carried to and from the various points, the order contains a discussion relating to the service on each claimed regular route. Within this discussion will be found the basic findings upon which the grant or denial of authority to serve such points is predicated. In almost every instance this finding is of the most general, nonparticularized sort. For example, the finding with respect to the many intermediate points denied on Monark's claimed route No. 1 is as follows:

> "From the foregoing evidence it will be observed that no shipments have been transported over or to some of these points prior to June 1, 1935, and that at certain others no service has been performed since that time. In some instances there have been long lapses of oper-

> ation at some points * * * at still other points the services have been very unsubstantial."

As another example, in the findings with respect to the service to the points in the vicinity of Philadelphia, the order states that:

> "* * * many were not served prior to the statutory date, others were served prior to, but not after such date, some were not served until 1937, 1938, 1939, 1940, and even until 1941, and * * * long lapses occurred in the operations to and from many of these points. The services at still others of such points have been very unsubstantial. For these reasons authority to continue operations to and from such points will be denied."

Among the points denied upon the basis of this finding was Camden, New Jersey, a highly important, integral part of the industrial complex of Philadelphia. In connection with this point, which is used merely as an example, it is clear from the whole record that the Commission failed to consider documentary evidence of shipments to Camden which were made prior to the statutory date or in the interim period and that numerous shipments during the period of so-called lapse of service were overlooked. It was and is impossible to determine from these findings definitely why or upon what basis the Commission denied to Monark authority to serve this point. Indefinite findings of the nature indicated are found throughout the order. In addition, the order contains absolutely no finding with respect to the highly important claimed regular route over U. S. Highway No. 1, between New Haven, Connecticut and Boston, Massachusetts.

The order of October 4, 1948, which granted to Monark the right to serve over seven of the nine route segments but denied authority to serve any of the intermediate or off-

route points on such route segments, contains the same general and indefinite findings with respect to such denials.

Upon final hearing on the merits, held on April 17-19, 1950, the District Court sustained the orders of the Commission and dismissed the complaint. The District Court held that, with exceptions noted in the opinion, the Commission's orders were supported by adequate findings and were based upon substantial evidence. With regard to the appellant's claim for authority to operate over U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts, the District Court found that the Commission had made no finding of any nature with respect to this claim of appellant. The Court stated that, without a specific finding, it was unable to determine the basis upon which the Commission had denied appellant authority to operate over this route. The Court ruled that, with this one exception, the matters involved were ripe for judicial review. The District Court held that with regard to determination of appellant's authority to operate in and to commercial zones of important cities, the Commission must take into consideration certificates and rights which have been granted to other carriers.

The Questions Involved Are Substantial

This appeal presents for decision the question of the necessity of findings in an order of the Interstate Commerce Commission and, more particularly, the question of the necessity of adequately definite findings fully expressing the basis for denials of rights. The orders here challenged fail to include in certain cases any findings whatsoever with respect to important portions of the motor carriers' claimed rights. Moreover, the findings contained in the orders challenged are so indefinite, general, and non-particularized as to preclude judicial review. The standard utilized by the Commission in denying to appellant authority to operate in

accordance with its claimed rights is not only unknown, but unknowable. The specific bases for the denials is in nearly every instance impossible to determine. Furthermore, although appellant demonstrated to the reviewing court that great masses of pertinent documentary evidence had been disregarded or ignored by the Commission in its determinations, the District Court was unwilling to undertake a review of the whole record to determine whether or not the findings lacked substantial evidentiary support or whether the Commission had arbitrarily denied rights to appellant on its preconceptions of what those rights should be.

If, after a disclosure of clear disregard of pertinent evidence resting upon the same footing as the evidence otherwise considered, denials of rights in an administrative order which are premised upon indefinite, non-particularized findings of the sort found in this order, cannot be set aside by a reviewing court, then no administrative order which utilizes the general language of the statute in its denial portions, can be set aside. Therefore, the questions involved are substantial and important not only to appellant, but to all persons involved in the administrative process.

1. The decision of the District Court is plainly erroneous in failing to remand the proceedings to the Commission for further consideration and the entry of specific findings. It is well settled by the Supreme Court that a conclusion of the Interstate Commerce Commission denying authority to a motor carrier for the transportation of general commodities over claimed routes and to claimed points requires not only evidence to support it, but findings of sufficient definiteness to express it. *Florida* v. *United States*, 282 U. S. 194; *United States* v. *Carolina Freight Carrier's Corp.*, 315 U. S. 475. Where the Commission concededly fails to make such findings a remand of the proceedings

to the Commission is appropriate and necessary, for without specific findings, judicial inquiry is halted at the threshold. *United States* v. *Carolina Freight Carrier's Corp., supra; Howard Hall Co.* v. *United States*, 315 U. S. 495. In the present case the District Court held that the Commission failed to make any findings whatsoever in explanation of its denial to Riss of authority to operate over U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts. Nonetheless, although the Court stated that without a specific finding it could not apprehend the reason for the Commission's denial, it failed to remand the proceeding to the Commission for entry of definite and specific findings. Appellant submits that this failure of the District Court was erroneous and requires reversal of the judgment below.

2. The ruling of the District Court that the orders of the Commission contain adequate findings is clearly erroneous. As noted, above, the orders in certain instances contain no findings of any nature in regard to the denials of important rights. In other instances, particularly with respect to a large number of intermediate and off-route points which were denied, the order contains findings which are wholly inadequate to disclose the standard applied to the evidence in order to arrive at the denials. Thus the Commission denies appellant the right to serve a particular point on the basis of a finding which is so indefinite and general as to amount to nothing more than a paraphrase of the words of the statute.

In this connection, the statute requires that an applicant be granted operating authority to serve a point if it can prove "bona fide operation" to such point since prior to June 1, 1935. The Supreme Court in a number of cases has defined the phrase "bona fide operations" to mean that if the evidence shows that there was (1) no service prior to

the statutory date or (2) sporadic, as distinguished from substantial, service, or (3) long lapses in the service, the standard of bona fide operation has not been met. *Alton R. Co.* v. *United States*, 315 U. S. 15; *United States* v. *Maher*, 307 U. S. 148; *United States* v. *Carolina Freight Carrier's Corp., supra.* It is plain, therefore, that the Commission in denying appellant authority to serve certain points on the basis that "many were not served prior to the statutory date, others were served prior to, but not after such date, some were not served until 1937, 1938, 1939, 1940, and even until 1941, and that long lapses occurred in the operations to and from many of these points" has merely restated the language of Section 206(a) of the Interstate Commerce Act. It is completely impossible to determine which one of these statutory criteria was applied to the evidence to arrive at the ultimate denial of rights.

Such an indefinite finding is particularly objectionable when, as here, it can be demonstrated that the initial findings of fact were almost wholly in error. It was shown both to the Commission and to the Court that the findings of fact included only a portion of the facts of record while the Commission ignored or disregarded the remainder of the evidence which was of precisely the same character and weight. Neither the Commission nor the United States contended in the District Court that the orders were correct in their factual determinations but, on the contrary, it was conceded (although this was not pointed out in the Court's opinion) both in brief and in oral argument that much of the evidence had been disregarded by the Commission and that this ignored evidence came from the same documents and was of exactly the same weight and character as the evidence considered by the Commission.

If, for example, the Commission had denied the point of Camden, New Jersey solely on a basic finding that there was

no service at that point prior to the statutory date, it might have been possible to set the order aside since it was shown to the Court that the Commission's finding of fact that there was no service prior to the statutory date was completely in error. With the generalized type of basic findings made by the Commission upon which its ultimate denial is predicated, it is impossible either for the appellant or for the reviewing court to say that the denial was based on this or any other reason or combination of reasons. It would equally well have sufficed for the Commission to have said that as to some points they felt that the standard of bona fide operation had been met while as to others for no specified reason they felt that the standard had not been met.

If this case is permitted to stand, not only is it possible for an administrative agency to deny rights merely by paraphrasing the statute without definitely assigning a reason for such denial, but also will it allow an agency to make denials without having to know or to find all the facts of record? Appellant respectfully submits that this violates all concepts of the requirements of fair administrative process.

3. The District Court upheld the Commission's orders on the basis that "apparently" there was substantial evidence to support the action taken and that the orders were not entered arbitrarily or capriciously. It is, of course, elementary that the Commission's orders, if supported by substantial evidence on the record considered as a whole, are valid. It may be further conceded that the Commission is the judge of the credibility of witnesses and weight of the evidence, *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, and that due deference must be paid to the expertise of the Commission. *Rochester Telephone Corp* v. *United States*, 307 U. S. 125. However, it is equally plain that where, as here, an order of the Commission is based

upon only part of the evidence and substantial portions have been ignored without rational basis, such order is arbitrary and unsupported by the evidence. *Baltimore & O. R. Co.* v. *United States*, 264 U. S. 258, 267. The Commission is unable to determine whether the statutory standard of bona fide operation has been met without considering the evidence offered to meet the standard. If the Commission can take only part of the evidence as it did in this proceeding and refuse to consider or ignore the existence of the remainder, the statutory right may be denied or reduced without reference to any standard.

And where the reviewing court likewise refuses to consider the whole record and the evidence offered to prove bona fide operation on the statutory date, basing its holding only upon the Commission's findings which in turn are based on only portions of the evidence, judicial review becomes a rubber stamp. Appellant submits that it is perfectly plain, merely from reading the opinion of the District Court, that the Court did not consider the evidence on the whole record, particularly the mass of evidence opposed to the Commission's determination. The frequent quotations from the very orders attacked, given as proof by the Court that the Commission did consider all the evidence, and the references to the Commission's "apparent" close consideration of the evidence, all demonstrate that the District Court did not examine the whole record but merely based its conclusions upon the Commission's own statements.[3] The entire opinion fails to disclose that the Court was even aware of the exhibits which appellant presented to the Court at the hearing on the merits which showed clearly the wholesale manner in which the Commission had disregarded the

[3] For example, at Page 26 of its Memorandum Opinion, the District Court states that "If the report of the Commission is carefully read, one cannot escape the conclusion that the Commission considered very thoroughly all of the evidence * * *".

uncontradicted evidence in the record before it. Surely, consideration of the whole record, within the meaning of Section 10 of the Administrative Procedure Act, at the very least requires the reviewing judge to read and consider, if not *all* the evidence, then those portions cited to him, and not merely the challenged report and order.

Appellant submits that although the Commission's findings are entitled to respect, they are not deserving of the absolute finality which the District Court gave them when the record before the Court clearly precludes the denial portions of the Commission's orders from being justified by a fair estimate of all the evidence on the record considered as a whole. The decision of the District Court clearly fails to adhere to the standards of judicial review recently stated by the Supreme Court, *Universal Camera Corp.* v. *N. L. R. B.*, 340 U. S. 474; *N. L. R. B.* v. *Pittsburgh Steamship Co.*, 340 U. S. 498, and on this issue the case should be remanded to the court for rehearing in accordance with law.

4. Furthermore, the decision of the District Court is manifestly erroneous by reason of the fact that it holds that the Commission must take into consideration certificates and rights which have been granted to other carriers in determining appellant's rights to serve the commercial zones of large cities on appellant's authorized routes. It is well settled by the Supreme Court that, on the contrary, the Commission may not give any weight in such determinations to the fact that competing carriers may be also certificated to serve the commercial zones and the right to a statutory grant may not be withheld or reduced because the Commission disapproves of the competitive conditions which may be created if the application is granted. *United States* v. *Carolina Freight Carriers Corp., supra.* In addition to this error of law which the District Court made in this aspect

of the case, it also ignored the showing made by appellant which disclosed that the Commission had disregarded masses of pertinent evidence proving service in and to the Commercial Zones of cities on the claimed routes. This failure to examine the whole record before the Commission evidences disregarded by the District Court of applicable standards of judicial review. *Universal Camera Corp.* v. *N. L. R. B., supra.*

The decision of the District Court and this entire proceeding is, of course, of great significance to appellant. Its outcome will seriously affect and hamper its ability to operate and to perform efficiently and economically the services which it is required to provide under certificates in force and by virtue of its status as a common carrier. Appellant, or its predecessor in interest, has, since prior to June 1, 1935, been engaged in providing fast, convenient and economical transportation of freight between the areas of the Central Middle-West to the west of the Mississippi River and points on the Eastern Seaboard. From the beginning, it has been faced with the most stubborn and persistent opposition from those interests most antagonistic to the concept of integrated, long-haul motor carriers, with all the advantages inherent in this form of transportation. The case is therefore, important not only to appellant but also to all persons, carriers and shippers alike, interested in seeing that the long-haul motor carrier is permitted to achieve its rightful role in the national transportation scheme as contemplated by the Motor Carriers Act of 1935.

But the case is of even wider significance than in its impact upon appellant and its effect upon the development of an integrated national transportation policy. The administrative order under review presents in the clearest possible way the basic issue with respect to the adequacy of findings required in an administrative order and the

extent to which a court can require an agency to base its conclusions on all the facts. It raises the issue of whether or not administrative agencies must express their basic conclusions in findings definite enough to disclose the rationale employed and the premise for the conclusions reached. Appellant respectfully submits that adequately definite findings are an absolute necessity if the reviewing court is to discharge the duty of reviewing administrative decisions to determine their substantial evidentiary support on the whole record as required by Section 10(e) of the Administrative Procedure Act. We believe that the questions presented by this appeal are substantial and that they are of importance to all persons seeking administrative determination of rights.

Respectfully submitted,

JOHN B. GAGE,
WENDELL BERGE,
A. ALVIS LAYNE, JR.,
Counsel for Plaintiff-Appellant.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Nos. 4806-4974

RISS AND COMPANY, INC., a corporation, *Plaintiff*,

vs.

UNITED STATES OF AMERICA and INTERSTATE COMMERCE COMMISSION, *Defendants*

MEMORANDUM-OPINION

Riss and Company, a corporation, organized under the laws of the State of Colorado, with its principal place of business in North Kansas City, Missouri, filed these suits to set aside certain orders of the Interstate Commerce Commission, alleging the denial to it of the right to serve certain routes, intermediate and off-route points which it claims the right to serve under the "grandfather clause" of the Motor Carrier Act of 1935 § 206(a) of the Interstate Commerce Commission Act; 49 U. S. C. 306(a) and upon 49 U. S. C. 305(g), and 28 U. S. C. 1398, 2321-2325.

The complaint alleges among other things that the orders of the Commission and the proceedings are unlawful and invalid insofar as they deny operating authority claimed by the plaintiff in its applications, because the Commission failed to consider relevant evidence, and on the grounds that the orders are not supported by substantial evidence, and are abitrary and capricious.

Plaintiff's alleged rights are based upon its application to continue service which it contends had been rendered by it prior to the critical date under the Act (June 1, 1935), and under the rights derived by it through the purchase of the Illmo Trucking Service, Inc., and the Monark Motor Freight System, Inc.

In case No. 4974 plaintiff, Riss & Company, seeks to enjoin the orders of the Commission made with respect to its rights

as an original operator and as derived through the purchase of the Illmo Trucking Service, Inc., and in Case No. 4806 plaintiff seeks to set aside the orders with respect to the denial of the rights to serve certain routes and route segments, and intermediate and off-route points on such routes and route segments, which plaintiff claims were denied to it in violation of its grandfather rights. The cases were consolidated for the purposes of hearing.

The original application filed by the plaintiff as such was known as "Docket No. MC-200" and when Riss & Company acquired the rights of the Illmo Trucking Service, Inc., which was pending before the Commission at that time, the two applications were assigned Docket No. MC-200 (Sub. No. 7). After filing application MC-200 plaintiff filed numerous other applications and they were assigned numbers subsequent to 200. It is in this proceeding that plaintiff seeks to enjoin the actions of the Commission in Case No. 4974.

Upon the acquisition of the Monark Motor Freight System, Inc., it was assigned Docket No. MC-200 (Sub. No. 46) and it is in this case number that plaintiff seeks to enjoin the Commission in Case No. 4806.

* * * * * * *

THE FACTS WITH RESPECT TO THE APPLICATION OF THE MONARK MOTOR FREIGHT SYSTEM, INC., AND ITS ACQUISITION BY RISS & CO., INC.

On January 23, 1936, and within the time prescribed by the Motor Carrier Act, Monark Motor Freight System, Inc., a Missouri corporation, filed with the Commission under the grandfather clause of the statute, an application for a certificate of public convenience and necessity for the carriage of general commodities over the routes, to points and within territories in the 19 states of Missouri, Kansas, Nebraska, Colorado, Texas, Oklahoma, Iowa, Illinois, Indiana, Ohio, Pennsylvania, West Virginia, Maryland, New Jersey, New York, Delaware, Rhode Island, Connecticut and Massachusetts. The application was assigned Docket No. MC-30077. A comparison of this application with that of Riss MC-200 reveals that Monark sought to serve the

same states plaintiff served, Delaware, Rhode Island and Connecticut, which Riss did not or had not served.

After informal hearings held before District Supervisors of the Commission, and pursuant to report filed by them, an order was entered by the Commission on March 3, 1938 which contained a description of the routes, termini, intermediate and off-route points served by Riss within commercial zones at important cities; irregular route rights for certain specified commodities, and the type of service to be rendered, and authorized the issuance of the described authority upon compliance with certain other sections of the Act. Thereafter a large number of protestants intervened. The Commission revoked the March 3 order and issued a second compliance order of June 13, 1938.

On March 20, 1939 the Commission set aside the compliance orders of March 3, 1938 and June 13, 1938 and a hearing was held in June 1939. Approximately sixty railroads and truck lines entered their appearance and participated in the hearings, which was exhaustive. Following the hearing, the examiner recommended the grant of some of the routes and points sought in the application and denied the remainder of the rights sought by the plaintiff.

In April 1942 Richard R. Riss, plaintiff's controlling stockholder and Chairman of the Board, acquired control of the Monark Motor Freight System, Inc., through the purchase of 60% of its outstanding capital stock. This acquisition of the Monark System was approved by the Commission on March 13, 1942.

Before any further action was taken with respect to the grandfather rights application proceeding, Riss & Co., Inc., purchased all the operating rights and property of Monark Motor Freight System, Inc. This action was likewise approved by the Commission on September 28, 1942 and confirmed in the plaintiff all rights of Monark in and to certificates of public convenience and necessity under the "grandfather" clause of the statute. The application following the purchase by Riss, was assigned Docket No. MC-200 (Sub. No. 46).

Prior to that time Monark had petitioned for a further hearing on the grounds of inadequate time for preparation

and discovery of new evidence. The Commission reopened the proceeding and the second hearing was held in April 1942, with respect to the rights of the applicant under the "grandfather" clause.

In January 1943, the examiner filed an intermediate report and recommended granting to the petitioner certain routes, and denied others. To this order the plaintiff filed exceptions on the ground that the conclusions:

> "(1) were not justified by the evidence;
> (2) were contrary to law, and that the examiner had erred in that he failed to find that the plaintiff was entitled to operate over all routes to which claim has been made or to serve all intermediate points on the regular routes and certain off-route points, as prayed for, and that he had also erred in failing to find applicant entitled to serve the City of Boston and its commercial zone."

On February 23, 1945 the Commission issued its final report and order in which it denied to plaintiff the right to operate over nine route segments, which were portions of the routes which had been allowed to the plaintiff, and the right to serve certain commercial zones and important termini and intermediate points on its authorized routes.

On March 16, 1945, the plaintiff filed Petition for Reconsideration of the denial portions of the Commission's order and to stay the effective date thereof as to the nine route segments and the commercial zones and intermediate and off-route points described in its order of February 3, 1945.

On April 23, 1945 the Commission, upon its own motion, entered an order reopening the proceedings designated as "Docket No. MC-200 (Sub. No. 46) for the purpose of determining whether plaintiff had been in bona fide operation since April 28, 1942 as a carrier by motor vehicle between the points, over the routes, and within the territory covered by the application (Monark) of January 23, 1936. The Commission denied the Petition for Reconsideration shortly thereafter, as to the nine route segments, and on August 14, 1945 (two days before the effective date of the order) plaintiff filed suit in the United States District Court

for the Western District of Missouri at Kansas City, against the United States of America and Interstate Commerce Commission seeking to enjoin enforcement of the order insofar as it denied to the plaintiff the nine route segments claimed by it.

On November 12, 1945 a three-judge court was convened and a temporary stay order restraining enforcement of the denials was issued. Thereafter, on December 3, 1945 the Commission entered an order which it contends was voluntary on its part, vacating that portion of its order of February 3, 1945 affected by the temporary stay order (the 9 route segments) for further consideration on the same record.

On May 9, 1946, plaintiff filed with the Commission a request in writing for leave to file a petition for reconsideration of all the applications for grandfather rights of both plaintiff itself and predecessor corporation, which plaintiff had acquired. This is the application heretofore described in connection with Riss and Illmo applications in Case No. 4974.

On July 23, 1946 leave was granted to file petition for reconsideration and it was filed on October 1, 1946. The Petition for Reconsideration was filed while the so-called "provider" case was pending (under the order of the Commission entered April 23, 1945 to determine the question of compliance).

On July 8, 1947 the Commission refused plaintiff's petition for Reconsideration filed October 11, 1946 and expressed its intention to immediately enforce those provisions of the order of February 3, 1945 which constituted denials of the operating rights to plaintiff over the nine route segments. Thereafter, on July 23 the plaintiff filed its original complaint in this case seeking to enjoin the enforcement of the denial portions of the orders of February 3, 1945.

The Commission had not yet reconsidered and passed upon the question of plaintiff's right to operate over the nine route segments, and the other issues which had been vacated by the Commission from the order of February 3, 1945 subsequent to the filing of the first suit to enjoin the enforcement of that portion of the order. The suit filed

July 23, 1947 did not come on for hearing until October 9, 1948.

On June 10, 1948 pursuant to the hearing under the Commission's order of April 23, 1945 it was found that plaintiff had not been operating as a common carrier within the meaning of the Act and required it to substitute and render reasonably continuous service within sixty days. The changes required by the Commission were made by the plaintiff, and on January 31, 1949 the Commission found that the plaintiff's new method of operation met the Commission's requirements, and on the same day the Commission also entered an order providing for further hearings, for the purpose of determining whether or not Riss & Co., Inc., was conducting its business in compliance with the order of June 10, 1948.

On February 9, 1948, the three-judge court convened for hearing plaintiff's complaint. At that time the "provider plan" investigation was still pending, and because of this fact, the court did not deem it advisable to dispose of the controversy, and entered an order which included the following language:

> "The Commission has thus in all respects treated the situation as if any phase of it that it desired to touch was still a pending matter (or, more accurately, part of a still pending proceeding), in the sense that none of complainant's vested rights arising out of Monark's grandfather operations or the determination of them has become fixed or final, so as to be beyond the Commission's power to summarily control, change and make further pronouncements. Again it appears that the Commission is also further engaged in an investigation of whether, since the grandfather rights cut-off date, Complainant has so changed its mode of operations that it can no longer claim to be a common carrier and so has no right to any certificates at all. And in dealing with this question and in countermanding the effective date of its previous certificate-right determination, it purportedly is acting under its powers of determining initial certificate rights and not under the

statutory provisions for revoking rights previously determined and fixed."

The route segments denied to the plaintiff in the order of February 3, 1945, were:

"(a) Between Decatur, Ill., and Indianapolis, Ind., over U. S. Highway 36.

(b) Between Shoals, Ind., and Louisville, Ky., over U. S. Highway 150.

(c) Between Indianapolis, Ind., and Chicago, Ill., over U. S. Highway 52 and 41.

(d) Between Cincinnati, Ohio, and Mansfield, Ohio, over U. S. Highway 42.

(e) Between Cincinnati, Ohio, and Zanesville, Ohio, over U. S. Highway 22.

(f) Between Fort Wayne, Ind., and Toledo, Ohio, over U. S. Highway 24.

(g) Between Cleveland and Lisbon, Ohio, over Ohio Highway 14; and between Salem and Liston, Ohio, over Ohio Highway 45.

(h) Between New York, N. Y., and Springfield, Mass., over U. S. Highways 1 and 5.

(i) Between Baltimore, Md., and Philadelphia, Pa., over U. S. Highways 40 and 13."

On October 4, 1948, the Commission entered its order relating to the 9 route segments above described, and found that the plaintiff was entitled to grandfather rights over 7 of the 9 route segments, with certain reservations with respect to off-route and intermediate points. The routes granted and the reservations are as follows:

"1. Between Decatur, Ill., and Indianapolis, Ind., over U. S. Highway 36.

No service is authorized to or from Decatur.

2. Between Shoals, Ind., and Louisville, Ky., over U. S. Highway 150.

No service is authorized to or from Shoals.

3. Between Indianapolis, Ind., and junction U. S. Highways 52 and 24 (near Kentland, Ind.) over U. S. Highway 52.

No service is authorized to or from the said junction.

4. Between Cincinnati, Ohio, and Zanesville, Ohio, over U. S. Highway 22.

No service is authorized to or from Zanesville.

5. Between Fort Wayne, Ind., and Toledo, Ohio, over U. S. Highway 24.

No service is authorized over this route between Toledo, on the one hand, and, on the other, points east of the Illinois-Indiana State Line.

6. Between Cleveland, Ohio, and Deerfield, Ohio, over Ohio Highway 14.

No service is authorized to or from Deerfield.

7. Between New York, N. Y., and Springfield, Mass., over U. S. Highway 1 to New Haven, Conn., and thence over U. S. Highway 5 to Springfield.

No service is authorized to or from any intermediate point on the above-described routes."

The effective date of the order was December 13, 1948. When this order was entered, the "provider plan" investigation was still pending.

On January 26, 1950, a hearing was held by the three-judge court upon the application of the defendants and intervenors for the purpose of securing a final hearing on the merits of this action. At the time of this hearing the Commission had not issued to plaintiff its final certificate of public convenience and necessity, but subsequently the Commission did issue a certificate of public convenience and necessity. This certificate became effective February 21, 1950 and incorporated within its contents the operating authority granted in the orders of February 3, 1945 and October 4, 1948.

On April 4, 1950 the plaintiff filed an amended complaint in which it sought to enjoin the Commission from enforcing this certificate, and also to set aside the denial portions

of the order (the route segments included in the denials of the October 4, 1948 order) and described in its complaint as:

> "(1) A segment of U. S. Highway 41 between its junction with U. S. Highway 24 and its junction with U. S. Highway 30; This is a north-south route, part of the route between Chicago, Indianapolis and Louisville.
>
> (2) A segment of U. S. Highway 42 between Cincinnati, Ohio, and Mansfield, Ohio.
>
> (3) A segment of Ohio State Highway 14 between U. S. Highway 224 and U. S. Highway 30. This is a small but highly important segment, on the most direct and natural route from Cleveland to Philadelphia and New York.
>
> (4) U. S. Highway 40 between Baltimore, Maryland and Philadelphia, Pennsylvania.
>
> (5) U. S. Highway No. 1 between New Haven, Connecticut and Boston, Massachusetts."

Most of these segments served as connecting links between main east and west routes and run north and south.

The contention of the Government with respect to the issues involved in Case No. 4806 are the same as those involved in case No. 4974 heretofore discussed, i.e., they are not properly before the court for review, due to the plaintiff's failure to exhaust its administrative remedies, and in the event the court should determine that the issues should be reviewed, the court should find that the evidence of record supports the findings and conclusions of the Commission.

With the exception of the one route "U.S. Highway No. 1 between New Haven, Conn., and Boston, Mass.," which will be discussed hereafter, we think the issues are properly before the court for review.

In the report of the Commission of October 4, 1948 the evidence with respect to each of the 9 route segments under consideration at that time was reviewed and additional findings were made. On Sheet 5 of the Commission's report, it used this language:

> "Each of the route segments will be discussed separately. In arriving at our conclusions as to whether

> or not applicant is entitled to 'grandfather' rights with respect to the route segments, we shall consider all shipments which might reasonably have moved over the segment in question. In other words, if the particular route segment would constitute part of the natural arteries of travel between points actually served on and since the statutory date and there is some evidence that the route segment actually was used, appropriate authority will be granted to continue operations over such route segment."

We think it is not necessary to repeat what the Commission has said in its order of October 4, 1948 relative to each of the routes in controversy, but in accordance with its statement above quoted, the Commission apparently reviewed very carefully the evidence with respect to all of the 9 route segments in controversy, discussed the evidence as to the time and nature of the service shown to have been rendered by the plaintiff over said routes and to the intermediate and off-route points, and based its findings and conclusions upon such evidence. The report covers numerous pages of the Commission's order. With respect to the denied route, the Commission, after this complete surveillance of the record, held there was no showing that plaintiff had served such routes or segments prior to or during the critical period.

With regard to the other routes . . . the ones allowed with reservations . . . the Commission carefully considered the evidence as to the alleged service by the plaintiff to the points allowed, and upon its finding that plaintiff failed to serve the denied intermediate and off-route points, refused plaintiff the right to serve said intermediate and off-route points. We are quoting herein the findings of the Commission with respect to one of the denied routes . . . the segment between Indianapolis and Chicago, and described in the plaintiff's brief as:

> "A segment of U.S. Highway 41 between its junction with U.S. Highway 24 and its junction with U.S. Highway 30; This is a North-South route, part of the route between Chicago, Indianapolis and Louisville."

"Indianapolis-Chicago.—This route segment embraces U.S. Highways 52 and 41 between Indianapolis and Chicago. It is part of claimed route 15 between Louisville and Omaha, from Louisville over U.S. Highway 31 through Seymour to Indianapolis, thence over U.S. Highway 52 to its junction with U.S. Highway 41, thence over U.S. Highway 41 to Chicago, thence over highways described in other routes to Omaha. Portions of claimed route 15 have been granted in the prior report, namely, between Louisville and Indianapolis, and between Chicago and the junction of U.S. Highway 41 and U.S. Highway 30 near Dyer, Ind. Thus the only portion of the described route segment requiring consideration is U.S. Highway 52 between Indianapolis and the junction of that Highway with U.S. Highway 41, and U.S. Highway 41 between the last-described junction and the junction of U.S. Highways 41 and 30 near Dyer. This segment connects (near Kentland, Ind.) with applicant's authorized route over U.S. Highway 24 between Peoria, Ill., and Fort Wayne.

"There is some oral evidence which indicates that during the prior period shipments from Louisville to Omaha and Council Bluffs were transported over U.S. Highway 31 to Indianapolis, thence over U.S. Highway 52 to its junction with U.S. Highway 41, thence over U.S. Highway 41 to Chicago, and thence over other highways to destination. Shipments from Louisville to Omaha and Council Bluffs were heretofore discussed in connection with the Shoals-Louisville route segment. In any event, it would appear that the more direct and natural route for shipments from Louisville to Omaha and Council Bluffs would be over the Shoals-Louisville route segment, thence over applicant's authorized routes through St. Louis and Kansas City to destination.

"There is no documentary evidence of operations by applicant between Chicago and Louisville, or between Indianapolis and Chicago during the prior or interim periods. It is probable, however, that portion

of this route segment was used by applicant in connection with operations between Omaha and Cincinnati. Thus in the prior report, the division, in discussing operations over claimed route 7 between Omaha and New York City, through Peoria and Fort Wayne, stated:

> 'In the prior and interim periods and thereafter, applicant also transported various commodities between Omaha and New York, respectively, and intermediate points on route 7, and between such respective termini, on the one hand, and on the other, numerous points on its routes. With regard to Omaha, the more substantial operations were to and from Cincinnati—* * *.'
>
> "A natural and direct route between Cincinnati and Omaha would be over applicant's authorized route from Cincinnati to Indianapolis, thence over that portion of the Indianapolis-Chicago segment consisting of U.S. Highway 52 from Indianapolis to junction U.S. Highway 24 near Kentland, and thence over applicant's authorized routes through Peoria and Galesburg, Ill., to Omaha. As stated, applicant has rendered a substantial operation between Cincinnati and Omaha. In the circumstances, we conclude that applicant is entitled to authority to continue the transportation of general commodities with exceptions, over U.S. Highway 52 between Indianapolis and junction U.S. Highway near Kentland. No service, however, is shown to have been rendered by applicant on or prior to the critical date to or from the said junction or intermediate points on U.S. Highway 52. Accordingly, the application to this extent will be denied."

This is typical of the Commission's apparent close consideration of the evidence of all of the routes, segments of routes, intermediate and off-route points, which are the subject of the controversy. Finally, in its general discussions and conclusions, the Commission used this language:

> "*General Discussion and Conclusions.*—In the foregoing discussion we have considered all the evidence

presented by applicant relative to the actual use of the nine route segments described, as well as the service rendered at points located thereon. The documentary evidence listing representative shipments transported by applicant is of value in that it indicates whether operations have been conducted on and continuously since the critical date, and the substantiality of the service performed. In the matter of the described route segments, it is seen that they are not claimed as complete routes in and of themselves, but either as portions of other and, in many instances, longer routes between other termini or as connecting links in forming such routes. In determining what highways were used, or reasonably could be said to have been used, in connection with these routes, we have considered all of the evidence. Included in such evidence is the testimony of qualified witnesses presumably familiar with the operations of applicant on and since the critical date. We also have taken into consideration the existence of natural and direct highways between the termini of the principal routes claimed, to which the instant route segments are adjunct or alternative, the rendition or nonrendition of service at intermediate points on the routes affected, and the substantiality and continuity of service where afforded. In our opinion, the evidence warrants the granting of authority to continue operations in the transportation of general commodities, with the exceptions noted, between the points, over the routes, and in the manner set forth in our findings herein.

"The routes granted herein will form portions of through routes from and to various parts of applicant's authorized system of regular routes, and service therefore will be authorized over any combination of the routes granted herein with those presently authorized, regardless of whether the routes joined have a common authorized point of service".

The only other route involved in this order was U. S. Highway No. 1 between New Haven, Connecticut, and

Boston, Massachusetts, with respect to which the plaintiff contends that no findings were made either in the order of February 3, 1945 or of October 4, 1948. Later in this memorandum we will discuss the disposition of this particular route or route segment separately from the ones included in the plaintiff's complaint.

If the report of the Commission is carefully read, one cannot escape the conclusion that the Commission considered very thoroughly all of the evidence with respect to Monark's service over the disputed routes prior to the critical period and made its findings and conclusions with respect thereto.

The Commission is the fact-finding body. The court does not make findings of fact, but simply determines whether or not the Commission's finding are supported by substantial evidence. Although the Court and the Commission might differ with respect to the weight of the evidence, or what the evidence reveals, yet that does not give the Court the right to decide whether or not the Commission is mistaken in its findings, if there is substantial evidence upon which to base those findings. In reviewing the evidence there may be instances where our finding would be different from that of the Commission, but we have no authority to substitute our opinion for that of the Commission, any more than an appellate court has the right to substitute its views as to the facts for that of a trial court or jury.

While a finding is not made with respect to the testimony of each and every witness and each and every exhibit, the over-all question of the weight of the evidence with regard to the particular route or the particular town sought to be served, is made. It is our thought that unless a request is made to the Commission to make specific findings as to particular issues or evidence—a basic or essential finding, if supported by the evidence, is sufficient to uphold the Commission's order. (*Florida* v. *U. S.*, 282 U. S. 194, 209). We think there was substantial evidence upon which to base the Commission's findings.

As heretofore indicated, the plaintiff insists that the Commission failed to make any finding whatsoever as to

"U. S. Highway No. 1 between New Haven, Conn., and Boston, Mass." either in its order of February 3, 1945 or any subsequent orders thereto, including the order of October 4, 1948 with respect to the 9 route segments. We do not know, and no one has informed us, whether or not the failure of the Commission to definitely make a finding as to this route in its disposition of the issues was an error, or whether it was intentional.

As we stated with respect to the same question heretofore determined in regard to Case No. 4974, we are unable to determine whether or not the Commission failed to take into consideration the evidence in relation to this route, and if so, whether or not that evidence was sufficient to sustain its views, or whether or not its actions were arbitrary and capricious. We think the plaintiff should call the Commission's attention specifically to this particular phase of the case so that it may correct the error, if there is an error, and if not, it may make the proper finding upon which to base a judicial review. As the situation stands, this question is not yet ripe for judicial review.

The next contention of plaintiff is in relation to the Commission's denial to it of the right to serve commercial zones in most of the major terminal areas to which it is authorized to operate. It is contended that the denial of such rights is clearly opposed to the evidence and not grounded upon any rational or consistent basis. These areas were not included in the Petition for Reconsideration of the 9 route segments, or in the Commission's order with respect to that petition. Plaintiff in its brief alleges that the February 3, 1945 certificate permits it to operate in the commercial zones of Kansas City and Chicago only, and that it is restricted to the municipal limits in its operation of these cities as of Boston, New York, Philadelphia, St. Louis, Cleveland and Cincinnati among others.

It is further contended that the commercial zones of a city include municipal or unincorporated towns contiguous or adjacent to the base municipality, and that the commercial areas of such cities, because of the tremendous growth outside of the municipal limits thereof, are in many instances more important in commercial and industrial ac-

tivity than the municipalities themselves, and that to deny it the right to serve such commercial zones is a violation of its rights.

Plaintiff has not cited to us any specific definition of the phrase "commercial zone." The court may take judicial notice of the fact that the industrial and business development outside of many of the large cities has grown to tremendous proportions, as plaintiff suggests; that because of such development, in many instances it is not possible for large cities to extend their municipal boundaries, and it is likely that such industrial and commercial growth will continue to expand far beyond the municipal limits of such cities.

We are not able to judicially define the term "commercial zone" with sufficient definiteness to make it apply to each and every city. We think, because of the vast experience of the Interstate Commerce Commission in resolving such questions, that where such an issue arises, the Commission's judgment, unless clearly legally unreasonable, should be accepted. In making its findings as to commercial zones, the Commission unquestionably must decide many questions of fact which the court is not empowered to determine, and must take into consideration certificates and rights which have been granted to other carriers.

Of course, it is easily conceivable that from a financial standpoint it would be far more profitable to a carrier if it were permitted to serve the commercial zones in cities such as described above without restriction, but the Congress has conferred upon the Commission the authority to determine such questions. It is obvious that as a matter of law, the Commission cannot act capriciously or arbitrarily in arriving at its conclusions.

After carefully considering the various elements pertaining to this issue, it is our opinion that the Commission has not acted arbitrarily or capriciously in this instance. The decision of complex transportation matters requires the exercise of the highest degree of judgment, not obtained without intricate detail and such matter is not properly the function of the reviewing court. (*New York* v. *U. S.*, 331 U. S. 284, 335; *Board of Trade* v. *U. S.*, 314 U. S. 534, 546).

Plaintiff is engaged in an extensive and complex operation covering routes extending in more than 20 states, from the Rocky Mountains on the west, to the Atlantic Coast on the east; from Massachusetts on the north, to Oklahoma on the south. When one considers the many complex problems incident to a determination of the rights of the plaintiff, and those through whom it claims, the Commission unquestionably has experienced great difficulty in arriving at the correct factual situation presented by the great amount of evidence submitted by the plaintiff.

In addition to this particular claimant, the Commission has also been required to study and determine many applications from other motor carriers seeking grandfather rights in the same states, in the same areas, over the same routes and to the same intermediate and off-route points. When one contemplates the entire situation, the Commission in determining plaintiff's rights apparently has established the parity between future operations and bona fide prior operations for which the Act was obviously designed. (*U. S.* v. *Carolina Carrier Corp.*, 315 U. S. 475; *Alton Rr. Co.* v. *U. S.* 315 U. S. 15).

It is our opinion, after careful consideration of the entire record in both cases, that with the exceptions noted in this memorandum as to certain questions with respect to which plaintiff has not exhausted its administrative remedies, the Commission's orders are supported by adequate findings and conclusions, based upon substantial evidence, and plaintiff's complaint is hereby dismissed.

HARVEY M. JOHNSEN,
Judge U. S. Court of Appeals.

ALBERT L. REEVES,
Judge U. S. District Court.

R. M. DUNCAN,
Judge U. S. District Court.

DATED: SEPTEMBER 27, 1951.

Appendix A

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION

Nos. 4806—4974

Riss and Company, Inc., a Corporation, *Plaintiff*,

vs.

United States of America and Interstate Commerce Commission, *Defendants*

Judgment Entry

This cause having come on for hearing on April 17, 1950, and the court having heard the evidence and arguments of counsel, said cause was taken under consideration.

After having duly examined the evidence and being fully advised, the court finds that the plaintiff is not entitled to a vacating of the orders of the Interstate Commerce Commission in the respective cases, for the reasons set out in the Memorandum Opinion this day filed, and the complaint is dismissed.

It is therefore ordered and adjudged that plaintiff's complaint be and it is hereby dismissed, and the costs thereof taxed against the plaintiff.

Harvey M. Johnsen,
Judge, United States Court of Appeals;

Albert L. Reeves,
Chief Judge, United States District Court;

R. M. Duncan,
Judge, United States District Court.

Dated: September 27, 1951

APPENDIX "B"

STATUTES INVOLVED

Interstate Commerce Act, Act of February 4, 1887, as amended August 9, 1935, c. 498, 49 stat. 543, 49 U. S. C. § 301, et seq.

Sec. 206(a), as added August 9, 1935, c. 498, 49 stat. 551, and amended June 29, 1938, c. 811, Sec. 8, 52 Stat. 1238 and September 18, 1940, c. 722, Title I, Sec. 20(c), 54 Stat. 923:

(1) Except as otherwise provided in this section and in section 310a of this title, no common carrier by motor vehicle subject to the provisions of this chapter shall engage in any interstate or foreign operation on any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: provided, however, That, subject to section 310 of this title, if any such carrier or predecessor in interest was in bona fide operation as a common carrier by motor vehicle on June 1, 1935, over the route or routes or within the territory for which application is made and has so operated since that time, or if engaged in furnishing seasonal service, only, was in bona fide operation on June 1, 1935, during the season ordinarily covered by its operation and has so operated since that time, except in either instance as to interruptions of service over which the applicant or its predecessor in interest had no control, the Commission shall issue such certificate without requiring further proof that public convenience and necessity will be served by such operation, and without further proceedings, if application for such certificate was made to the Commission as provided in paragraph (b) of this section and within one hundred and twenty days after October 1, 1935, and if such carrier was registered on June 1, 1935, under any code of fair competition requiring registration, the fact of registration shall be evidence of bona fide operation to be considered in connection with the issuance of such certificate. Otherwise the application for such certificate shall be decided in accordance with the procedure provided for in section 307(a) of this title and such certificate shall be issued or denied

accordingly. Pending the determination of any such application the continuance of such operation shall be lawful: And provided further, That this paragraph shall not be so construed as to require any such carrier lawfully engaged in operation solely within any state to obtain from the Commission a certificate authorizing the transportation by such carrier of passengers or property in interstate or foreign commerce between places within such State if there be a board in such State having authority to grant or approve such certificates and if such carrier has obtained such certificate from such board. Such transportation shall, however, be otherwise subject to the jurisdiction of the Commission under this chapter.

Administrative Procedure Act. Act of June 11, 1946, c. 324, 60 Stat. 237, 5 U. S. C. § 1001, et seq. Sec. 10, 5 U. S. C. § 1009:

Except as far as (1) statutes preclude judicial review of (2) agency action is by law committed to agency discretion—

(a) Right of Review.—Any person suffering legal wrong because of any agency action, or adversely affected or aggrieved by such action within the meaning of any relevant statute, shall be entitled to judicial review thereof.

(b) Form and Venue of Action.—The form of proceeding for judicial review shall be any special statutory review proceeding relevant to the subject matter in any court specified by statute or, in the absence of inadequacy thereof, any applicable form of legal action (including actions for declaratory judgments or writs of prohibitory or mandatory injunction or habeas corpus) in any court of competent jurisdiction. Agency action shall be subject to judicial review in civil or criminal proceedings for judicial enforcement except to the extent that prior, adequate, and exclusive opportunity for such review is provided by law.

(c) Reviewable Acts.—Every agency action made reviewable by statute and every final agency action for which there is no other adequate remedy in any court shall be subject to judicial review. Any preliminary, procedural, or intermediate agency action or ruling not directly reviewable shall be subject to review upon the review of the final agency action. Except as otherwise expressly required by statute,

agency action otherwise final shall be final for the purposes of this subsection whether or not there has been presented or determined any application for a declaratory order, for any form of reconsideration, or (unless the agency otherwise requires by rule and provides that the action meanwhile shall be inoperative) for an appeal to superior agency authority.

(d) Interim Relief.—Pending judicial review any agency is authorized, where it finds that justice so requires, to postpone the effective date of any action taken by it. Upon such conditions as may be required and to the extent necessary to prevent irreparable injury, every reviewing court (including every court to which a case may be taken on appeal from or upon application for certiorari or other writ to a reviewing court) is authorized to issue all necessary and appropriate process to postpone the effective date of any agency action or to preserve status or rights pending conclusion of the review proceedings.

(e) Scope of Review.—So far as necessary to decision and where presented the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of any agency action. It shall (A) compel agency action unlawfully withheld or unreasonably delayed; and (B) hold unlawful and set aside agency action, findings, and conclusions found to be (1) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law; (2) contrary to constitutional right, power, privilege, or immunity; (3) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (4) without observance of procedure required by law; (5) unsupported by substantial evidence in any case subject to the requirements of sections 7 and 8 or otherwise reviewed on the record of any agency hearing provided by statute; or (6) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court. In making the foregoing determinations the Court shall review the whole record or such portions thereof as may be cited by any party, and due account shall be taken of the rule of prejudicial error.